

April 6, 1998

D-7800
ADM 1.10

MEMORANDUM

To: Regional Director, PN, MP, LC, UC, GP
Attention: PN-3700, PN-3702, MP-820, LC-3100, LC-3103,
UC-440, GP-3800
Director, Administrative Service Center
Attention: D-2940
Director, Management Services
Attention: D-7800, D-7810
Director, TSC
Attention: D-8170

From: Linda Waring Wilson /s/Linda Waring-Wilson
Manager, Acquisition and Assistance Management Services

Subject: Reclamation Acquisition Regulation ((RAR) Revision
Project Electronic Transmittal No 98-01, Supplement 4

1. Purpose: To transmit revisions to the RAR.
2. Effective date: April 6, 1998; except WBR 1401-7001-3 which becomes effective October 1, 1998. The old AAMS review and approval thresholds remain in effect until then.
3. Expiration date: In effect until revised.
4. Background: This memorandum (and its supplements) is used to issue final acquisition regulation revisions during fiscal year 1998. The attached RAR changes are made to modify Reclamation acquisition review and approval procedures. In addition, Business and Economic Development Program policies are revised to stress administration of subcontracting plans. The supplement also implements revisions required by FAC 97-04 and makes other minor changes.

Draft revisions were issued electronically for comment on February 27, 1998. Several comments were received which resulted in improvement to the final product. Comments on substantive issues are summarized below. Comments which were editorial in nature are not discussed, but all such suggestions were adopted. We would, as always, like to thank all commenters for their in-depth review of the draft changes.

a. Comment on WBR 1401.7001-3(b): The WBR should establish standard review thresholds for each type of contract or action similar to the current method so everyone is subject to the same standard. Office workload should have nothing to do with it. Our customers, as well as the specialists, get frustrated now with the ever changing regulations and if the thresholds change each year they are going to be even more disgusted with the process and acquisition personnel. Thresholds should be set at a certain dollar level and not negotiated for each office.

Response: DIAR 1401.7001-3 states in pertinent part that administrative review and approval requirements for contract actions shall be established by the HCA and must at a minimum address a representative percentage of the overall contract actions within a bureau. The DIAR section goes on to say that the procedures shall include identification of the type and dollar amounts of the actions to be reviewed based on the volume and nature of the contracting office workload. Unfortunately, establishing review and approval thresholds based on standard dollar levels for all offices proved to be woefully inadequate in securing this representative sample due to the wide disparity in individual acquisition office workloads. The representative sample should include work from each Regional Office, and this did not happen under the standard threshold method. Lowering standard thresholds to dollar levels which would result in the examination of work from all offices would be unfair and extremely burdensome to some offices. Therefore, this suggestion did not result in changes to the original proposal.

Also please keep in mind that DIAR 1401.7001-4 holds HCA's responsible for ensuring contracting activity compliance with law and regulations through the review and oversight process. Unlike several other bureaus, Reclamation has abandoned traditional acquisition and assistance management reviews, choosing instead to perform this required measurement function by flexible quality review and assessment techniques. The requirement for specific agreements seems to be the least burdensome process which will allow the HCA to carry out this required responsibility.

b. Comment on WBR 1401.7001-3(b)(3)(iii): Suggest adding, "For sealed bids, documentation for awarding to other than the lowest bidder."

Response: We agree and have made the suggested change.

c. Comment on WBR 1401.7001-4: This change is too burdensome on the field offices. A copy of all actions submitted for review and approval by the CCO and Denver policy office should be adequate when AAMR's are not performed.

Response: This is another one of the flexible assessment techniques discussed under paragraph a above. The after-action reviews will not result in any processing delays and will hopefully allow D-7800 to provide constructive criticism and suggestions on incorporating the many new techniques that have been placed at our disposal over the last several years.

d. Comment on WBR 1401.7001-4(f): I don't have a problem with what you want to be reviewed, but it will be difficult to determine the first one in some of these categories. For instance, on the first bilateral mod increasing the contract amount, if the amount of the change is below our office's threshold for independent review, will we have to establish a register for the sole purpose of knowing when to submit something for review? I think we could have a problem tracking these.

Response: The reason for suggesting, in the proposed coverage, review of the first document in each category was to avoid submission of a huge number of items towards the end of the fiscal year. However, upon further reflection, these are after-action reviews, not requests for approval. Therefore, reviews do not have to be completed before the end of the fiscal year. We have modified the final language to require one of each applicable document during the fiscal year. Since we would still prefer to have these reviews spread out if possible, we suggest that one way to accomplish this would be to send in the first one performed during the year.

e. Comments on WBR 1419.705-3(a):

(1) I disagree with setting minimum subcontracting goal percentages in solicitations. There's no guarantee that the solicitation will be awarded to a large business, and this will confuse small and small disadvantaged businesses. Stating minimums doesn't encourage large businesses to set any higher goals than just the minimum.

(2) These requirements are not necessary, confusing, and an added burden on the personnel involved in the evaluation.

(3) Who will determine the minimum percentages to be included in the contract? The end item and the location could impact each requirement.

(4) If we set the goals, then we would also have to justify their reasonableness every time liquidated damages are contemplated. Being the author of the document we would be held responsible for the accuracy of content. As it is now, liquidated damages may be assessed based upon the difference between the contractor's stated goals and their actual accomplishment. I believe the Comptroller General has clearly stated that liquidated damages must meet the test of reasonableness, lest they become unauthorized punitive damages. We would be throwing the Government into the mix under the proposed change.

Response: This coverage was proposed for addition based on information received from the Small Business Administration that the SBA Reauthorization Act of 1997 (PL 105-135, December 2, 1997) mandated minimum solicitation evaluation factors for proposed subcontracting plans and for offerors' attainment of previous subcontracting plan goals. However, review of the current compilation of the Small Business Act (PL 85-536), which now includes amendments made by the Reauthorization Act, reveals that such evaluation factors are required only for bundled contracts. (Bundling of contract requirements means consolidating 2 or more procurement requirements for goods or services previously provided or performed under separate smaller contracts into a solicitation of offers for a single contract that is likely to be unsuitable for award to small business.) Therefore, the proposed RAR section has been deleted. We anticipate that FAR implementation of the SBA Reauthorization Act will cover the issue of bundled contracts in great detail. We have also deleted proposed associated coverage at WBR 1419.705-4. (See also subparagraph j on liquidated damages.)

f. Comment on WBR 1419.705-3(b): I don't think we should require every proposer to expend the effort of preparing a plan. What if they aren't even within the competitive range? The FAR requires the plan be submitted and approved before award. I think it should remain that way.

Response: Coverage deleted. See response under subparagraph e above.

g. Comment on WBR 1419.705-4: FAR 19.705-4 deals with an unacceptable subcontracting plan as a matter of responsibility, as does the Comptroller General (see CCH 7210), not responsiveness

Response: The cited FAR reference discusses both responsiveness and responsibility as described in the current version of WBR 1419.705-4. The proposed coverage would have placed failure to meet minimum subcontracting goal percentages into the responsiveness area. Since the coverage on prescribed goals was not adopted (see subparagraph e), this language has also been eliminated.

h. Comment on WBR 1419.705-6(j): We already provide D-7800 with copies. Is this another requirement?

Response: The requirement to furnish SF 294's to D-7800 was previously deleted. This revision restores the distribution instruction.

i. Comments on WBR 1419.705-6(k):

(1) What guidelines do we use to do the review and judge the contractor's program; shouldn't we rely on the expertise of the SBA or the OSDBU to determine the effectiveness of the contractor's subcontracting program?

Response: DIAR 1419.705-6(k) states that the CO shall be responsible for conducting on-site business and economic development program management reviews of a prime contractor's small and disadvantaged business subcontracting program. Reviews are to be conducted as required based on problems perceived such as insufficient progress in meeting subcontracting goals. At the discretion of the CO, the BUDS may conduct the reviews. The proposed RAR coverage was intended to beef up our administration of this program since Reclamation failed to meet two of its three subcontracting goals for fiscal year 1997. However, in recognition of our ever dwindling resources and of the multiple responsibilities held by remaining staff, the final language has been modified to encourage rather than require reviews where appropriate.

(2) The words "on-site" should be deleted. On site where? At the home office, because that's where the goals were made and promised? At the project site where the work is occurring? I believe we should do a management review, I just don't believe that on-site is necessary and it could be limiting.

Response: We agree and have dropped "on-site" from the final version.

j. Comment on WBR 1419.705-7: This regulation is worthless since goals in subcontracting plans are "best level of effort" and not mandatory. The attempt to assess liquidated damages for not meeting a goal will be more trouble than it is worth and result in unnecessary litigation expenses.

Response: FAR 19.705-7 covers liquidated damages for subcontracting plans. It states that when a contractor fails to make a good faith effort to comply with a subcontracting plan, liquidated damages shall be paid by the contractor pursuant to 15 USC 637(d)(4)(F). It goes on to say that if, after consideration of all pertinent data, the CO finds that the contractor failed to make a good faith effort to comply with its subcontracting plan, the CO shall issue a final decision

to the contractor to that effect and require the payment of liquidated damages in an amount stated [as computed in accordance with FAR 19.705-7(b)]. The coverage added by this supplement provides a systemic method of insuring that this “good faith effort” analysis is being completed and documented.

k. Comments on WBR 1419.708 and WBR 1452.219-80:

1. Include the contract administration office as a recipient of the annual SF 295 even though the contractor is required to send us the semi-annual SF 294.

2. This clause is not necessary. It requires the contractor to submit copies of the SF 295 to three separate offices for review but not to the CO who is charged with the responsibility of contract administration. Are one or all of these three offices going to analyze the report and contact the contractor if they have problems with it? The original report should be submitted to the CO.

Response: The back of the SF 295 requires contractors to forward the report to the OSDBU Director unless otherwise provide for in instructions by the Department or Agency. DIAR 1419.705-6(i) instructs COs to ensure that the contractor forwards the original copy of the SF 295 to OSDBU. The purpose of the RAR revision is to provide the BEDP manager with a method to ensure that Reclamation is receiving proper credit from OSDBU for subcontracting goal accomplishment. Based on the foregoing comments, we have added the CO to the distribution list in the new clause at WBR 1452.219-80.

5. Explanation of changes:

a. WBR 1401.7080 is revised to include informational copies of documents which are required as a result of the revisions to Subpart WBR 1419.

b. WBR 1401.7001-3(b) is revised to provide for procedures which will lead to a representative sample of actions being submitted for AAMS review and approval.

c. WBR 1401.7001-4 is modified to provide for AAMS after-action reviews of designated actions.

d. WBR 1403.104-5(b) is deleted in accordance with FAC 97-04, FAR Case 97-601. This case removes “an obsolete requirement” for maintenance of a record of persons having access to proprietary or source selection information.

e. WBR 1404.8110-2(b)(2) is revised to delete the requirement for 3-digit sequential numbers for contract modifications and solicitation amendments. IDEAS PD only allows for the number, with no preceding zeros.

f. WBR 1413.307(a)(2) is modified to delete reference to the Guide for Processing Receiving Reports and Invoices dated March 1992. The document has been rewritten to reflect contemporary coverage of this issue, framed in terms of IDEAS PD. It has been referenced in the RAR at WBR 1446.6. (See paragraph o below.)

g. WBR 1419.705-6(h) is revised to delete OSDBU as a recipient of approved subcontracting

plans. OSDDBU has submitted a DIAR change to PAM and has advised us to discontinue this distribution in the interim. They have also advised that they do not need any other notification of subcontracting plans, other than the SF 295.

- h. WBR 1419.705-6(j) is added to require that a copy of all SF 294's be sent to D-7800.
- i. WBR 1419.705-6(k) is added to encourage business and economic development program management reviews when subcontracting reports show noncompliance with plan goals.
- j. WBR 1419.705-7 is added to provide for a written determination on whether to assess liquidated damages when a contractor fails to meet subcontracting plan goals.
- k. WBR 1419.708 is added to provide a new clause which requires contractors with subcontracting plans to furnish a copy of SF 295's to D-7800 and the contracting officer.
- l. The Table of Contents for Part WBR 1419 is revised to reflect the foregoing changes.
- m. WBR 1442.202 is changed to correspond with revised FAR coverage resulting from FAC 97-04, FAR Case 95-022.
- n. WBR 1442.203 is deleted as a result of the FAR Case referenced in the preceding paragraph, and the Table of Contents for Part WBR 1442 is changed accordingly. [Although the revised FAR coverage does not contain a requirement for level above the CO review as currently discussed in FAR 42.203(b) (effective date of revised FAR is April 24th), DIAR 1442.203 still states that the HCA has the authority to review the validity of retaining contract administration while requesting extensive post award support from another contract administration office.]
- o. WBR 1446.601 is added to recognize the revised Guide for Processing Receiving Reports and Invoices, March 1998. The Table of Contents for PART WBR 1446 is modified to reflect this addition.
- p. WBR 1452.219-80 is added as discussed in paragraph k, and the Table of Contents for Part WBR 1452 is modified to reflect the addition.
- q. WBR 1452.252-82 is revised to reflect the new trade agreements thresholds published by the US Trade Representative in the Federal Register on December 31, 1997 and previously incorporated into the RAR at WBR 1425.402 by ET 98-01, Supplement 3, February 20, 1998.

6. Action required:

- a. Pen and ink changes: none.
- b. Filing instructions. Replacement pages are contained in Attachment 1.

Remove Pages:

PART WBR 1401
PART WBR 1403
PART WBR 1404

Replace Pages:

PART WBR 1401
PART WBR 1403
PART WBR 1404

PART WBR 1413
 TOC PART WBR 1419
 PART WBR 1419
 TOC PART WBR 1442
 PART WBR 1442
 TOC PART WBR 1446
 PART WBR 1446
 TOC PART WBR 1452
 PART WBR 1452

PART WBR 1413
 TOC PART WBR 1419
 PART WBR 1419
 TOC PART WBR 1442
 PART WBR 1442
 TOC PART WBR 1446
 PART WBR 1446
 TOC PART WBR 1452
 PART WBR 1452

We would like to remind you that the entire RAR, including these revisions, is available in PDF format on our Internet homepage: <http://www.usbr.gov/aamsden/>.

c. DIAPR 95-5, which provided a deviation from the clause at FAR 52.225-35, Affirmative Action for Special Disabled and Vietnam Era Veterans, has been obviated by FAC 97-04, Item IX, FAR Case 95-602. Per the Office of Acquisition and Property Management, this DIAPR will pass into the annals of acquisition history on the effective date of the FAC for this case, April 24, 1998.

7. Point of contact: Ron Simonich, (303) 445-2447.

Signed: Linda Waring-Wilson

Attachments

bc: D-7800 (8 copies w/attachment)
 D-7810 (14 copies w/attachment)

WBR:RSimonich:jl:4/02/98:445-2499
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